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# In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 832

IN THE MATTER OF THE PRESENTMENT BY THE GRAND JURY OF WITNESS JAMES AUSTIN ELLISON

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the circuit court of appeals (R. 30–31) is not yet reported. The opinion of the district court (R. 18a–23a) is reported in 44 F. Supp. 375.

### JURISDICTION

The judgment of the circuit court of appeals was entered February 15, 1943 (R. 31). The petition for a writ of certiorari was filed March 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether Section 268 of the Judicial Code authorized the district court summarily to punish

petitioner who, as a witness under subpoena to testify before the grand jury, gave "evasive, perjurious, and contumacious answers to questions asked him."

## STATUTE INVOLVED

Section 268 of the Judicial Code (28 U. S. C. 385) provides in part:

> The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, * * * and the disobedience or resistance by any * * * witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

## STATEMENT

Petitioner was adjudged guilty of contempt of court (R. 24a–25a) after trial before the District Judge on an order to show cause why judgment of contempt should not be made (R. 3a) based on presentment by the grand jury charging appellant with contumacious conduct (R. 3a–15a). He was sentenced to imprisonment for a period of three months (R. 25a). The circuit court of appeals affirmed the conviction (R. 31a).

The allegations of the presentment (R. 3a–15a) may be summarized as follows:

In December 1941, the grand jury was investigating election frauds in New Castle County, Delaware, in connection with the National Election held November 5, 1940 (R. 3a–4a). It appeared from the testimony that there had been fraud in procuring the printing by one William N. Cann, Inc., of 29,000 official ballots which were delivered to certain political headquarters and some of which were later marked outside the polling places and cast in the ballot boxes (R. 6a, 10a–12a). During the course of the investigation, William N. Cann perjuriously testified concerning the printing and delivery of the 29,000 ballots and withheld from the jury the fact that they had been printed "in response to a special order of Ellison," the petitioner (R. 12a). Cann thereafter told petitioner, who was also subpoenaed to testify before the grand jury, of his perjurious testimony, and on December 10, 1941, while Cann and petitioner "were sitting in the hall outside of the Grand Jury room, each waiting to be called as a witness," petitioner "endeavored to influence the said Cann not to change his perjurious testimony" (R. 14a). Petitioner himself appeared as a witness before the grand jury on three different occasions and "gave obstructive, evasive, perjurious and contumacious answers to questions propounded to him before this Grand Jury and has deliberately, wilfully and contumaciously obstructed, impeded, and hampered the investigation of the said Grand Jury and the administration of Justice" (R. 15a).

An order to show cause was issued on March 6, 1942 (R. 3a), and petitioner filed a motion to quash in which he urged, *inter alia,* that the charges contained in the presentment "cannot lawfully be made the subject of summary proceedings for contempt" (R. 16a–18a). A hearing was held (R. 1a, 19a) and on April 15, 1942, the court filed an opinion denying the motion (R. 18a–23a). Petitioner thereupon entered a plea of not guilty, a full hearing was had, and the District Judge found petitioner guilty, stating that he was "satisfied that the evidence shows beyond a reasonable doubt that Ellison did obstruct the administration of justice by giving evasive, perjurious, and contumacious answers to questions asked him while he was before the Grand Jury" (R. 24a–25a).[1]

## ARGUMENT

Petitioner seeks reversal upon the ground that his contumacious conduct was not committed "in the presence" of the court or "so near thereto as to obstruct the administration of justice" within the meaning of Section 268 of the Judicial Code authorizing federal courts summarily to punish

[1] In neither the opinion (R. 24a) nor the judgment and commitment (R. 25a) did the trial court make any finding in respect of the charge that in the hallway of the courtroom petitioner suborned Cann to commit perjury. The *per curiam* opinion of the circuit court of appeals (R. 30–31) affirming the conviction is likewise limited to the power of the district court to punish summarily petitioner's contempt before the grand jury.

contempts of their authority (Pet. 9–10). This contention is without merit.

1. Petitioner overlooks the further provision of Section 268 authorizing district courts to punish summarily witnesses who disobey any "lawful writ, process, order, rule, decree, or command of the said courts," irrespective of where such disobedience occurs. Petitioner does not dispute that he was lawfully subpoenaed by the district court to appear before the grand jury and there to testify fully and truthfully. But when he gave "evasive perjurious and contumacious answers to questions asked him" (R. 24a, 25a), we think it is plain that petitioner disobeyed the command of the court's order quite as much as if he had failed to appear at all. As this Court said in *Blair* v. *United States,* 250 U. S. 273, 282, "the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry." See also *Wilson* v. *United States,* 221 U. S. 361, 385–386; *Fairfield* v. *United States,* 146 Fed. 508–509 (C. C. A. 8); *United States* v. *McGovern,* 60 F. (2d) 880, 889 (C. C. A. 2), certiorari denied, 287 U. S. 650; *United States* v. *Goldstein,* 105 F. (2d) 150 (C. C. A. 2); cf. *Blackmer* v. *United States,* 284 U. S. 421, 439–440. In this view, whether petitioner's contempt before the grand jury was committed in the "presence" of the court is immaterial, and *Nye* v. *United States,* 313 U. S. 33, upon which he relies, is inapposite.

2. Apart from petitioner's disobedience of the court's order it is well settled that "The grand jury is an appendage of the court, and proceedings before it are regarded as being in the presence of the court. Contempts occurring there are treated as taking place in the presence of the court and are included in the class referred to as 'direct contempts.'" *United States* v. *Dachis*, 36 F. (2d) 601, 602 (S. D. N. Y.); see also *Clark* v. *United States*, 289 U. S. 1, 11; *Savin, Petitioner*, 131 U. S. 267, 277; *United States* v. *Brown*, 116 F. (2d) 455 (C. C. A. 7); *Camarota* v. *United States*, 111 F. (2d) 243, 246 (C. C. A. 3), certiorari denied, 311 U. S. 651; cf. *Wilson* v. *United States*, 77 F. (2d) 236, 240–242 (C. C. A. 8), certiorari denied, 295 U. S. 759; *O'Connell* v. *United States*, 40 F. (2d) 201, 203 (C. C. A. 2), certiorari dismissed, 296 U. S. 667; *Loubriel* v. *United States*, 9 F. (2d) 807, 808–809 (C. C. A. 2). Since, therefore, petitioner's contempt was committed in the "presence" of the court, *Nye* v. *United States* is again irrelevant, for the Court was there concerned only with that class of contempts alleged to have occurred out of the presence of the court but "so near thereto as to obstruct the administration of justice."[2]

[2] Petitioner contends (Pet. 10–12) that the *Nye* case "stands for the proposition that an act which is alleged to be contemptuous and which also constitutes a crime is not punishable unless it *clearly* is necessary 'to insure order and decorum in the court.'" However, we do not believe that the *Nye* case embodies an "order and decorum" rule for criminal

Nor does the *Nye* case hold, as petitioner suggests (Pet. 10, 11, 12; see also Pet. 3), that contumacious conduct which is also criminal may be punished only after indictment and trial by jury. It is true that in discussing the history and scope of Section 2 of the Act of March 2, 1831, now Section 135 of the Criminal Code (18 U. S. C.

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contempts. Cf. *Pendergast* v. *United States*, No. 183, this Term, decided January 4, 1943. In *McKee* v. *United States*, 126 F. (2d) 470 (C. C. A. 6); *Gillon* v. *United States*, 124 F. (2d) 1018 (C. C. A. 5); *Wimberly* v. *United States*, 119 F. (2d) 713, 714 (C. C. A. 5) and *Millinocket Theatre* v. *Kurson*, 39 F. Supp. 979 (D. Me.) upon which petitioner also relies (Pet. 11–12), no part of the misconduct occurred in or near the court and thus, as the district court pointed out (R. 21a), these cases are not relevant where, as here, the contempt is committed in the presence of the court or consists of a violation of a court order. In *Schmidt* v. *United States*, 124 F. (2d) 177 (C. C. A. 6), cited by petitioner (Pet. 12), the misconduct consisted in filing certain affidavits in the clerk's office, and it was held not to be a contempt because the court was not in session. Contrary to petitioner's suggestion (Pet. 7; see also Pet. 3), it is clear that the court was "in session" in the present case when its appendage, the grand jury, duly impaneled and sworn at a regular term of court (R. 3a–4a) and acting with the aid of the process of the court (R. 14a, 15a) was in session (R. 22a). *People ex rel. Choate* v. *Barrett, Justice*, 9 N. Y. Supp. 321, 323 (1890), quoted with approval in *Wilson* v. *United States*, 77 F. (2d) 236, 241–242 (C. C. A. 8), certiorari denied, 295 U. S. 759; see also *Camarota* v. *United States*, 111 F. (2d) 243, 246 (C. C. A. 3), certiorari denied, 311 U. S. 651; *In re Hale*, 139 Fed. 496, 500 (C. C. S. D. N. Y.), affirmed *sub nom. Hale* v. *Henkel*, 201 U. S. 43; *People* v. *Parker*, 374 Ill. 524 (1940), certiorari denied, 313 U. S. 560; *In re Kelley's Estate*, 365 Ill. 174, 178, 179 (1937).

241),[3] this Court said that "meticulous regard" must be had for the right to trial by jury as to those categories of acts obstructive of the administration of justice punishable under that Section when committed neither "'in' nor 'near' to the 'presence'" of the court (313 U. S., at p. 49). But there is nothing in the opinion to suggest that this Court intended to cast doubt upon the power of judicial tribunals to punish obstructions committed in their presence or in violation of their lawful orders, where such conduct also violates the penal code. Cf. *Clark* v. *United States,* 289 U. S. 1, 10–12; *O'Connell* v. *United States,* 40 F. (2d) 201, 204–205 (C. C. A. 2), certiorari dismissed, 296 U. S. 667. On the contrary, this Court took

[3] Section 135 of the Criminal Code (18 U. S. C. 241) provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

pains to point out that "It has been held that an act of misbehavior though covered by the latter provisions [sec. 135, Criminal Code] may also be a contempt if committed in the 'presence' of the Court. *Savin, Petitioner, supra* [131 U. S. 267]. And see *Sinclair* v. *United States,* 279 U. S. 749."

## CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or any question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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